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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL LOCHIATTO, CHERYL ROGERS A/K/A CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME, ANTHONY BATTISTA,
Petitioners,

vs.

STATE OF FLORIDA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
FOURTH DISTRICT COURT OF APPEALS
FOR THE STATE OF FLORIDA

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QUESTIONS PRESENTED

1. Is the Florida Obscenity Statute, F.S.A. 847.07(4)(c) as written and/or as the same may have been authoritatively construed, unconstitutional for impermissibly chilling the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States and thus void of vagueness and overbreadth for failing to conform to the minimum standards set forth by this Court in *Miller v. California,* (1973) 423 U.S. 15?

2. Does a state statute which has been construed to define "scienter" or "knowing" the "contents and the nature and character" of the press materials charged as violative of the Florida Obscenity Statute, F.S.A. 847.07(4)(c) in a manner authorizing obscenity convictions on mere "constructive knowledge, violates Petitioners' due process rights and impermissibly chill the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States?

3. Were the procedures employed by law enforcement officials violative of Petitioners' First, Fourth, Fifth and Fourteenth Amendment rights where as here, the issuance of the Search Warrant by the Magistrate did not focus searchingly on the question of obscenity, and where as here, a mass warrantless seizure of approximately three hundred (300) additional sexually oriented films was made in violation of the teachings of Walter v. U.S., _____ U.S. _____ 100 S. Ct. 2395 (1980), and where as here, the "fruit" of the "poison" tree was introduced in evidence on the issue of scienter?

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II. A state statute which has been construed to define "scienter" or "knowing" the "contents and the nature and character" of the press materials charged

as violative of the Florida Obscenity Statute, F.S.A. 847.01(4)(c) in a manner authorizing obscenity convictions on mere "constructive" knowledge, violates Petitioners' due process rights and impermissibly chill the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States 12

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STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
FOURTH DISTRICT COURT OF APPEALS
FOR THE STATE OF FLORIDA

The Petitioners respectfully pray that a Writ of Certiorari issue to review the per curiam judgment of the Fourth District Court of Appeals, of the State of Florida, in which no opinion was published, of February 11, 1981. (Appendix A). A timely Petition for Rehearing was filed and denied without comment on March 12, 1981. (Appendix B).

Pursuant to Rule 9.030 of the Florida Rules of Appellate Procedure, the Supreme Court of the State of Florida lacks jurisdiction to consider questions of appeal where, as here, a Florida Court of Appeals has rendered a per curiam decision, without opinion. The

Fourth District Court of Appeals of Florida is therefore the highest state court of last resort in this case within the State appellate system.

OPINION BELOW

The Per Curiam Order of the Court and the minute entry denying the Petition for Rehearing are, as earlier indicated, attached hereto as Exhibits A and B.

JURISDICTION

The Per Curiam Order of the Fourth District Court of Appeals was entered on February 11, 1981 and the minute entry denying the Petition for Rehearing was rendered on March 12, 1981. Rule 9.030 of the Florida Rules of Appellate Procedure, under the circumstances of a per curiam decision without opinion, makes this the court of last resort in the State appellate system. An Application for Extension of Time Within Which to File a Petition for Writ of Certiorari was filed with this Court directed to the Honorable Lewis F. Powell, Jr. as Circuit Justice for matters arising out of the geographical area served by the Fifth Circuit, which encompasses the State of Florida. The Court by Order extended the time within which the Petition could be filed, to June 9, 1981. The Court's jurisdiction is invoked under Title 28 United States Code Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, as well as Florida Statutes Annotated F.S.A. 847.07(1), 847.07(4)(c) are set forth in Appendix C. herein.

STATEMENT

Petitioners were convicted following a consolidated trial in the Circuit Court in and for Broward County, Florida. Petitioners were sentenced on September 14, 1978 on three Counts. Count 1:

Wholesale promotion of obscene material, F.S.A. 847.07(4)(c), a felony; Count 2: Conspiracy to engage in wholesale promotion of obscene material, F.S.A. 777.04(3), a misdemeanor; Count 3: Distribution of obscene material, F.S.A. 847.04(1)(2), a misdemeanor. Pre-trial motions to dismiss on the grounds of the unconstitutionality of the law were made and denied.

The Petitioners were sentenced as follows:

Michael Lochiotto, guilty on all three (3) counts. Five (5) years probation, concurrent, with the first six (6) months to be served by imprisonment in the County jail and a $1000.00 fine. Cheryl Rogers, a/k/a/ Cheryl Long, guilty on Counts 1 and 3. One probation concurrent, with a $250.00 fine. Paul Girdley, guilty on Counts 1 and 3. Three (3) years probation, concurrent, with the first thirty (30) days to be served by imprisonment, and a $500.00 fine. William Thayme, guilty on Count 2. One year probation, with the first ninety (90) days to be served by imprisonment, and a $250.00 fine. Anthony Battista, guilty on all three counts. Five (5) years probation, concurrent, the first year to be served by imprisonment, and a $5000.00 fine.

Petitioners are presently at large on bail pending this Petition for Writ of Certiorari.

The evidence of the materials alleged to be obscene was obtained by a search warrant, the procedures surrounding the issuance of the same are set forth in the issues raised by this Petition, as well as the warrantless seizure of three hundred (300) films from the warehouse without a search warrant a fact which was used before the jury to go to the issue of scienter. A Motion to Suppress was made pre-trial and denied.

After the sentencing, as aforesaid, relevant appeals were filed and have now been denied by the Court in a Per Curiam Order without opinion. It is from this Per Curiam Order affirming the judgments as against Petitioners, for which review is sought by this Petition.

REASONS FOR GRANTING WRIT

I.

THE FLORIDA OBSCENITY STATUTE, 845.07(4)(c) AS WRITTEN AND/OR AS THE SAME MAY HAVE BEEN AUTHORITATIVELY CONSTRUED, IS UNCONSTITUTIONAL FOR IMPERMISSIBLY CHILLING THE DISSEMINATION OF PRESS MATERIALS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THUS VOID OF VAGUENESS AND OVERBREADTH FOR FAILING TO CONFORM TO THE MINIMUM STANDARDS SET FORTH BY THIS COURT IN *MILLER V. CALIFORNIA*, (1973) 423 U.S. 15.

There is little doubt that the guarantees of the First Amendment extend beyond verbal expression. *Brown v. Louisiana*, 383 U.S. 131, 86 Sup. Ct. 719 (1966); *People v. Vaughn*, 183 Col. 40, 514 F.2d 1318 (1973). On numerous occasions, the United States Supreme Court has held that communicative entertainment is entitled to the protection of the First Amendment. *Joseph v. Burstyn v. Wilson*, 343 U.S. 495, 72 Sup. Ct. 777 (1952); *Schact v. United States*, 398 U.S. 58, 90 Sup. Ct. 155 (1970). Further, it is of no significance that the expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 Sup. Ct. 631 (1963).

In *Miller v. California*, 413 U.S. 15, 93 Sup. Ct. 2607 (1973), the United States Supreme Court announced a new set of standards for identifying obscene material. This standard was necessary since the Supreme Court had abandoned the *Roth – Memoirs* test of obsentity as culled from the cases *Roth v. United States*, 354 U.S. 476, 77 Sup. Ct. 134 (1957) [hereinafter "Roth] and *John Cleland's*

"Memoirs of a Woman of Pleasure" v. Commonwealth of Massachusetts, 383 U.S. 413, 886 Sup. Ct. 975 (1966) [hereinafter "Memoirs"]. ". . . Now the Memoirs Test has been abandoned as unworkable by its author, and no Member of the Court today supports the Memoirs formulation." *Miller v. California, supra.* It should be noted that F.S. 847.07 was designed specifically to meet the standards of the *Roth – Memoirs* test, as expressly invalidated by the Court in *Miller.*

The *Miller* standards were announced as,

> "(a) Whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the purient interest . . .;
>
> (b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) Whether the work, taken as a whole, lacks serious litery, artistic, political, or scientific value." *Miller*, at 24, 25.

In an attempt to further define the Section (b) requirement of the above standard, the Court adopted a 'hard core' test. The Court then outlined two examples of what was meant by that term 'hard core';

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller, supra.*

The *Miller* Court further required that in order for a state statute to meet this test, its scope of regulation must be confined to "works which depict or describe sexual conduct" and:

> "[t]hat conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller, supra.*

Florida Statute §847.07 does not meet the *Miller* standard for specificity of conduct to be regulated as written or as authoritatively construed.

The Florida Supreme Court's unclear and unreasonable attempt to "authoritatively construe" §847.07 in *State v. Aiuppa,* 298 S.3d 391, amounts to an impermissible usurpation of the legislatie function of the Florida legislature. The construction placed upon this statute is tantamount to a complete judicial rewriting solely for purposes of meeting changing United States Supreme Court standards and guidelines.

The Court clearly amended §847.07 F.S. (then Ch. 120 Laws of Florida) calling it 'authoritative construction'. A simple comparison of the pertinent portion of the statue, before and after *Aiuppa,* reveals the enormity of the Court's revision. The statute, by its language, defines materials obscene if:

> "The statutory definition states: 'Material is obscene if . . . its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion . . ." *Aiuppa,* at 396.

After the Supreme Court of Florida construed this same passage, it is purported to mean:

> "Materials are obscene if its predominant appeal is to prurient interest, that is, sexual conduct which is shameful or morbid such as nudity, sex, which includes sexual interecourse, cunnilingus, sodomy, and fellatio, or excretion."

It is unclear whether the "interest" modified by prurient should itself be changed to "conduct" or not as the Court seemingly addresses only the clarifying language of the statute. It is clear from this reading of the statute that the Florida Supreme Court is merely

attempting to place the specific language required of the *Miller* test, into a statute that was designed to comply with *Roth – Memoirs* test. Such a clearly demonstrable case of judicial usurpation of legislative functions is abhorrent and unconstitutional under Florida law. *Florida Constitution, Article 2, Section 3, F.S.A.*

Even assuming, *arguendo,* that the Supreme Court of Florida had the power to legislate in the manner described above, and exercised it properly, §847.07 is still unconstitutional under the laws of the United States. The Florida Supreme Court has failed to delineate in *Aiuppa,* or any case since, the full range of activities that are included in their construction of obscene. While holding in *Aiuppa* that, " . . . these . . . *include* cunnilingus, sodomy and fellatio . . . " (Emphasis added). *Aiuppa,* at 396. The Court does not give nor suggest that a specific description of "an ultimate sexual act" other than those listed exist. If, in fact, these three acts are "included" in an entire grouping of prohibited acts, the specificity required by the *Miller* decision is still lacking. Floridians must now guess as to what other "conduct" renders nudity and sex shameful and morbid in the minds of the justices of the Florida Supreme Court. No Florida citizen can be given notice as to any further prohibited acts by this construction, yet many may refrain from engaging in the distribution of protected First Amendment materials due to the vagueness of this authoritative construction of the statute.

A statute which sweeps within its ambit of activities which in ordinary circumstances constitute freedom of speech or expression, is overbroad in violation of the First and Fourteenth Amendments. *Thornhill v. Alabama,* 310 U.S. 88, 60 Sup. Ct. 736 (1940); *Grayned v. City of Rockford,* 408 U.S. 104 Sup. Ct. 2294 (1974). The concern of the courts in fashioning and applying the doctrine of overbreadth is to insure that broadly worded statutes do not deter through fear the exercise of First Amendment rights. *Coates v. Cincinnati,* 402 U.S. 611, 91 Sup. Ct. 1686 (1971).

The Supreme Court of the United States in *Erzonznik v. City of Jacksonville,* 422 U.S. 205, 95 Sup. Ct. 2268 (1975), recognized the

need for specificity and clarity especially when the statute seeks to regulate or prohibit rights protected by the First Amendment.

The standard in F.S. §847.07 is by its very nature, vague and "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 Sup. Ct. 126, 70 L.Ed. 322 (1926). Its language, even as construed, is hardly more definite than other terms which have been struck down in such cases as *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 Sup. Ct. 1298 (1968), and *Rabeck v. New York*, 391 U.S. 462, 88, Sup. Ct. 1917 (1968).

The overbreadth tendency of obscenity statutes has been recognized by the Colorado Supreme Court. When confronting its own state obscenity statute, the Court said:

> "Given their plain and ordinary meaning, the words 'nudity, sex, sexual conduct, sexual excitement, . . . sadism, masochism, or sado-masochistic abuse,' are not representative of the specificity contemplated by the Supreme Court in *Miller*. The Supreme Court has declared that to be obscene, 'expression must be in some significant way, erotic.' *Erznoznik v. City of Jacksonville*, supra; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 Sup. Ct. 2628, 37 L.Ed. 2d 446 (1973); (Brennan J. dissenting); *Cohen v. California*, 403 U.S. 16, 9 Sup. Ct. 1780, 29 L. Ed. 2d 284 (1971); *Roth v. United States*, 354 U.S. 476, 77 Sup. . . . 1304 L.Ed 2d 1498 (1957). The statutory definition of 'obscene' in Colorado is drawn overly broad in that it obviously includes activities which could be described or depicted in some context other than an erotic one." *People v. Tabron*, 544 P.2d 372 (1976). (Emphasis added).

The Florida statute is plainly lacking the requirement of eroticism and suffers the same defect as Colorado's statute prior to its invalidation.

The Washington Supreme Court in *State v. J-R Distributing Incorporated*, 512 P.2d 1049 (1973), reasoned that the engrafting was acceptable since, as they contended, the *Roth* definition of obscenity was still valid. However, the Court was unable to cite any post-*Miller* decisions in support of this proposition. *J-R Distributing*, supra., at 1060.

Other State Supreme Courts have considered their state's obscenity statutes and found them to be within the constitutional requirements of *Miller* due to *authoritative constructions*. *Slaton v. Paris Adult Theater I*, 231, G 312 201 SE2d 456 (1973), *cert denied*, 418 U.S. 939 (1974); *Pierce v. State of Alabama*, 473, 296 S.2d 218 (1974), *cert. denied*, 419 U.S. 1130 (1975). *People v. Heller*, 33 N.Y.2d 314, 307 N.E.2d 805 (1973); *Price v. Commonwealth*, 214 Va. 290, 201 S.E.2d 789 (1974), *cert. denied*, 419 U.S. 902 (1975); *Gibbs v. State*, 504 S.W.2d 719 (1974); *State v. Welke*, 216 N.W.2d, 641 (1974); *State v. Amato*, 343 So.2d 698 [Louisiana] (1977); *The Western Corporation v. Commonwealth*, 558 S.W.2d 605 [Kentucky] (1977); *Hunt v. State*, 601 P.2d 464 [Okla.] (1979); *State v. Piepenburg*, 602 P 2d 702 [Utah] (1979); *State v. Haig*, 578 P.2d 837, [Utah] (1978); *State v. Manzo*, 573 P.2d 945, [Hawaii] (1977); *State v. Hull*, 546 P.2d 912, 86 Wash.2d 527 (1976); *Hess v. State*, 536 P.2d 362, [Okla.] (1975); *State v. American Theater Corporation*, 230 N.W.2d 209, 194 Neb. 84 (1974); *State v. Siegel*, 354 A.2d 103, 130 N.J. Super, 373 (1975); *People v. Neumayer*, 275 N.W.2d 230 [Michigan] (1979); *State v. Bryant*, 203 S.E.2d 27, 285 N.C. 27 (1974); *State v. Watkins*, 203 S.E.2d 429 [S.C.] (1973); *Alexander v. Commonwealth*, 203 S.W.2d 441, 214 Va. 539 (1974); *State v. Bryant*, 201 S.E.2d 211, 20 N.C. App. 223 (1973); *State v. Burgun*, 384 N.E.2d 255, 56 Ohio St.2d 354 (1978); *People v. Hobbs*, 375 N.E.2d 1367 [Illinois] (1978); *People v. Ridens*, 321 N.E.2d 264, 59 Ill. 2d 362 (1974); *Commonwealth v. Claflin*, 298 N.E.2d 888 [Mass.] (1973); *People v. Heller*, 352 N.Y.S.2d 601, 33 N.W.2d 314 (1973); *State v. Burch*, 365 So.2d 1263 [Louisiana] (1979); *First Amendment Foundation of Florida, Inc. v. Florida*, 364 So.2d 450 (1978).

Many other State Supreme Courts, realizing they had no prior authoritative construction, or refused to do so, as admitted by the Court in *Aiuppa*, and recognizing the doctrine of legislative supremacy, have invalidated their state obscenity statutes. *People v. Tabron*, supra.; *Mohoney v. State*, 300 N.E.2d 66 (Ind. 1973); *State v. Wedelstedt*, 213 N.W.2d 652 (Ia. 1973); *State v. Shreveport News Agency*, 287 S.2d 464 (La. 1973); *Commonwealth v. Horton*, 310 N.E.2d 316 (Mass. 1974); *Art Theater Guild, Inc. v. State*, 510 S.W.2d 258 (Tenn. 1974); *Commonwealth v. MacDonald*, 34 Atl.2d 290 (Pa. 1975); *ABC Interstate Theaters, Inc. v. State*, 325 S.2d 123 (Miss. 1976); *McCright v. Olson*, 367 F.S.937 (Three-Judge D.N.D., 1973); *State v. Princess Cinema of Milwaukee, Inc.*, 292 N.W.2d 807 (1980); *D & J Enterprises, Inc. v. Michaelson*, 401 A.2d 440 [R.I.] (1979); *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738 [Tenn.] (1979); *Art Theater Guild, Inc. v. State*, 510 S.W.2d 258 [Tenn.] (1974); *People v. New Horizons, Inc.*, 616 P.2d 106 [Col.] (1980); *People v. Tabron*, 544 P.2d 372, [Col.] (1976).

The Florida Supreme Court tried in 1979 to engraft an authoritative judicial construction on §847.07 of F.S.A. in the case of *First American Association of Fla., Inc. v. State*, 364 So.2d 450 (Fla. 1979), when they stated in pertinent part:

> "In *State v. Aiuppa*, 298 So.2d 391 (Fla. 1974), we considered the constitutionality of Section 847.07 under the standards of *Miller*. That is, we were faced with the question whether the statute specifically defines conduct the depiction or description of which shall be deemed to be obscene. We construed the statutory language defining obscenity in terms of appeal to prurient interest to refer to the depiction of certain conduct. And we held that the specific acts of sexual conduct the depiction of which was proscribed by the statute included intercourse, cunnilingus, sodomy and fellatio.

The *Aiuppa* decision stands for the further proposition that authoritative constructions that amplify an anti-obscenity statute that are in force (published) at the time of an obscenity offense apply to define obscenity for purposes of notice of what is proscribed and for purposes of instructing a jury so that the judicial constructions may be considered in determining whether the statute meets Miller standards. This principle is also stated in *Rhodes v. State*, 283 So.2d 351 (Fla. 1973).

The *Aiuppa* rule of applicability of authoritative constructions in force at the time of the offense is applicable here. *Aiuppa* itself provides such an amplifying construction and was in force at the time of the commission of the obscenity offenses at issue now. The appellant clearly was put on notice that the films it exhibited depicted conduct reached by the statute. The types of ultimate sexual acts 'specifically defined by the applicable state law, as written by authoritatively construed,' *Miller*, above, include precisely those alleged in the informations to have been depicted in these films. The trial court judge was correct in upholding the statute against appellant's vagueness challenge."

Thus, as has been shown, §847.07 has not been constitutionally rewritten by the Supreme Court of the State of Florida. Further, even if the state as rewritten is considered a valid construction, it still is not specific enough to meet constitutional scrutiny within permissible limits imposed by the case of *Miller v. Calif., supra.*

"Invariably the Court has felt obliged to condemn systems in which the exercise of such authority was not bound by precise and clear standards. The reason has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste of censorship — reflecting the natural distaste of a

free people is deepwritten in our law." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 95 Sup. Ct. 1239, 43 L. Ed.2d 4448 (1975).

For these reasons, F.S. §847.07 is unconstitutional and unavailable to prosecute Petitioners in the present case.

II

A STATE STATUTE WHICH HAS BEEN CONSTRUED TO DEFINE "SCIENTER" OR "KNOWING" THE "CONTENTS AND NATURE AND CHARACTER" OF THE PRESS MATERIALS CHARGED AS VIOLATIVE OF THE FLORIDA OBSCENITY STATUTE, F.S.A. 847.07(4)(c) IN A MANNER AUTHORIZING OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE, VIOLATES PETITIONERS' DUE PROCESS RIGHTS AND IMPERMISSIBLY CHILLS THE DISSEMINATION OF PRESS MATERIALS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

In *Smith v. California,* 361 U.S. 147 (1959), the Supreme Court reversed the convicition of a proprietor of a bookstore who was convicted pursuant to a City Ordinance which had been construed to impose abosolute criminal liability for mere possession of obscene materials. Justice Brennan, speaking for the majority, said the ordinance was constitutionally defective under the First Amendment because it failed to require that the possessor or seller have *scienter,* which he equated with "knowledge of the contents" of the material in question. In the absence of a *scienter* requirement, he noted that any statute or ordinance that permitted the imposition of criminal liability for the sale or possession of obscene materials would be

likely to result in an impermissible self-censorship by the bookseller, thereby restricting the public's access to non-obscene as well as obscene material. As the majority of the Court stated:

> "For if the bookseller is criminally liable without knowledge of the contents and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself and his timidity in the fact of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, wold be impeded." 361 U.S. at 153-154.

Broadly, the case stands for the proposition that there can be no constitutionally valid imposition or imputation of criminal liability where the statute or ordinance that an individual may be charged with violating could implicate in any of its possible applications a potential infringement of the rights guaranteed in the First Amendment.

In *Speiser v. Randall*, 337 U.S. 512 (1958), the Court stated that in a criminal prosecution, due process demands that where a person is to suffer a penalty for a crime, the prosecution must prove the elements of the crime beyond a reasonanble doubt. The Court went on to say that "where the First Amendment is involved a State cannot declare an individual presumptively guilty of a crime or presume that he has committed one of the material elements thereof." *Supra*. at 523-524.

Thus, it can be said that the government cannot create a presumption of *scienter* from a mere finding that the material in question is obscene, in the absence of any affirmative evidence on the issue of *scienter*.

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), three publishing corporations having a common president brought suit in the United States District Court for the District of Columbia to enjoin a non-mailability order of the Postmaster General against certain of their magazines. The District Court denied injunctive relief, and the Supreme Court reversed. Justice Harlan, in announcing the judgment of the Court, was of the view that without a showing of *scienter* on the part of the publishers, the magazines could not be removed from the mails on the ground that they contained information of where obscenity could be obtained.

Justices Harlan and Stewart denied proscription of the magazines because it was nnot shown that the publishers knew their advertisers were offering explicit matter. Thus, the Court held that actual knowledge of the nature of the publications is required under *Title 18 U.S.C. §1461*. The two Justices applied the reasoning of *Smith v. California, supra.*, to the case. They felt that the fear of loss of an issue of a periodical by removing it without a showing of knowledge or *scienter* on the part of the publishers would give rise to self-censorship.

Thus, it is clear requisite *scienter* cannot be predicted on a presumption i.e., that a distributor's knowledge that the general character of his stock is sexually oriented is not presumptively determinative that he had the requisite knowledge of the character and content of a magazine. This same analogy is applicable to a proprietor of a bookstore, i.e., the proprietor is presumed to be aware of the general nature of the stock he carries, but without facts proving the proprietor was aware of the specific character of a magazine lying on his shelf, he cannot be held to have the requisite *scienter* needed for a violation of statute. From the viewpoint of pure First Amendment theory and Court decisions involving statutory regulation of obscenity, the central problem involved in the *scienter* requirement lies in the determination of the type of evidence which supports a constitutional finding of *scienter*.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Appellant was convicted pursuant to a New York statute for hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell the same. The evidence of *scienter* was founded in part upon the Appellant's "instructions to his artists and writers, his efforts to disguise his role in the enterprise that published and issued the books, the transparency of the character of the material in question, the massive number of obscene books he published, hired others to prepare, and possessed for sale." The Court held that "proof of guilty knowledge was required in order to avoid the hazard of self-censorship and to compensate for the ambiguities inherent in the defintiion of obscenity." *Supra.* at 511. Thus, the evidence disclosed that the Appellant was "aware of the character of the material" inasmuch as he took a predominant role in the production of the material as publisher, author, and editor. Thus, the Court found ample evidence of a "calculated purveyance of filth" to establish *scienter*. It is important to note that the requisite *scienter* was predicated upon the facts which amply showed that the Appellant personally and purposefully directed the creation of material which was designed to appeal to deviant sexual groups. No such showing has been made in this case. As to Petitioners BATTISTA and GIRDLEY, no scintilla of evidence of *scienter* was ever entered at trial.

Relying on the Supreme Court decisions which have attempted to illustrate the constitutional requirement of *scienter*, it is apparent that in each case the evidence adduced showed that the Petitioners, and each of them, knew or had reason to know of the explicit nature of the material. This situation must be distinguished from that of a publisher or retailer who has been charged with violating the applicable obscenity statutes, where there is lack of affirmative evidence showing that he was personally aware of the explicit nature of a book, magazine or film, as in the instant case. See *Kingsley Books, Inc. v. Brown*, 334 U.S. 436 (1957); *Ginzburg v. United States*, 383 U.S. 463 (1966); and, *Ginsberg v. New York*, 390 U.S. 629 (1968); *Commonwealth v. Rosenberg*, 398 N.E.2d 451; *State of Louisiana v. Entertainment Specialists, Inc.*, 386 So.2d 653.

The most recent pronouncement of the United States Supreme Court on the requirments of *scienter* is found in *Hamling v. United States*, 418 U.S. 87 (1974). There, the Supreme Court confirmed the constitutional relevance of *scienter* as a necessary ingredient to a conviction under obscenity laws. Justice Renquist, writing for the majority, stated:

> "We think the 'knowingly' language of 18 *U.S.C.* §*1461* and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the prosecution show that the Appellant *had* knowledge of the contents of the material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (Emphasis added).

Consistent with the above statements from *Hamling*, the prosecution must show that Petitioners and each of them, "had" knowledge of the content, character and nature of the materials, rather than that he "should have had" knowledge of the content, character, and nature of the materials with which he was charged.

In order to determine whether a Petitioner had the requisite *scienter*, State and Federal Courts have looked to several factors. For example, in *People v. Williamson*, 24 C.R. 734 (1962), *cert. denied*, 377 U.S. 994 (1963), the Appellant was convicted pursuant to a California statute prohibiting the "wilful sale of an obscene book." The finding of *scienter* was established by the evidence which disclosed the following facts: (a) that the Appellant was informed that the book was "filthy;" (b)that the Appellant read the book and stated that "it was pretty bad;" and, (c) that the Appellant ordered additional copies of the book and that Appellant continued to sell them at the time he admitted that he read the book. Thus, the *scienter* requirement was based on the fact tht since the Appellant had admittedly read the book, he was charged with knowledge of the sexually explicit character of the book. The Florida Supreme Court seemed to say the same thing in *Johnson v. State*, 351 So.2d 10 (1977).

Mere ownership of an establishment has been held insufficient to prove *scienter* in *People v. Andrews*, 11 C.R. 276 (1972).

The *scienter* requires knowledge of the contents and the nature and character of a publication, has also been shown in *Commonwealth v. Thureson*, 357 N.E.2d 750 (Mass. 1976). In *Commonwealth v. Rosenberg, supra*, the Petitioner, had worked in the bookstore for three days. She claimed that she did not know for whom she worked, and upon being questioned, responded to the police officer, that although she had a "pretty good idea" what was in the peep-show machines, she had never viewed the films. From these facts, the Supreme Judicial Court of Massachusetts reasoned that the prosecution failed to produce evidence "from which a jury could conclude beyond a reasonable doubt that the Appellant had seen, or should have seen or otherwise had knowledge of, the material's contents," especially in light of the fact that no one had called Appellant's attention to the contents of the machines at the back of the store and her sole contact with them was to change money. See also *People v. Speer*, 52 111, A.3d 203, 367 N.E.2d 372 (1977); *State v. Blair*, 32 Ohio St.2d 237, 291 N.E.2d 451 (1972); and, *Johnson v. State*, 351 So.2d 671 (Fla. App. 1975).

In *Campagno v. State*, 323 So.2d 671 (Fla. App. 1978), the Appellant was convicted pursuant to a Florida statute for conspiracy to promote any obscene matter or performance. The evidence disclosed that the Appellant had procured and paid performers who acted out scenes depicting sexual intercourse, cunnilingus, fellatio; he also had given advice to performers, and had taken still photographs. On appeal, the District Court of Appeals of Florida held that this evidence coupled with evidence that Appellant received compensation for his services performed in connection with the filming established *scienter* and was sufficient to sustain Appellant's conviction.

At this point, it is significant to note that to render one guilty of knowingly selling or distributing obscene materials, it is necessary

that Petitioners, and each of them, had actual knowledge of the contents of the material, as well as character and natures of the films. It is important to note that *scienter* has been based on various factors: (1) A Dealer's *personal* involvement in the creation, assembly, and advertisement of the material; (2) A Dealer's *personal* selection of materials which depicted the sexual activity; (3) A Dealer's *personal* dominion and control over shipmentsof films, and his furtive attempts to dissuade law officers; (4) A Dealer's *purposeful* design to distribute press materials that would appeal to a prurient interest; (5) A Dealer's commercial exploitation of erotica through advertisements of textual and graphic emphasis of the sexually provocative aspects of his films; and (6) A Dealer's widespread and indiscriminate distribution by a manner which thrusts on the unwilling public of materials with reckless disregard of the identity and age of his recipients.

It is apparant from the jurisprudence that actual knowledge of the contents and nature and character of the books, or where the circumstances so warrant *scienter*, is to be based on facts which establish that the Petitioners had reason to be aware of the contents and nature and character of the material. Each case established the fact that it was the Petitioner's *personal* involvement either in the creation, advertisement or dissemination of material which established a factual predicate for holding that the Petitioners had "knowledge" within the meaning of the obscenity statutes.

The constitutional mandates require that a conviction under F.S.A. §847.07 must be based on facts which prove that Petitioners, and/or each of them, was shown to have cognizable knowledge of the contents and of the nature and character of the materials he was charged with wholesaling or distributing.

Relying on the constitutional and criminal mandates, it can be observed that when any act is made criminal by statute, the existence of a criminal intent must be regarded as an essential element of the crime charged.

Thus, the quality of *scienter* needed to sustain a conviction under §847.07 must be based on affirmative evidence, establishing a factual predicate for a constitutional finding that the party charged did in fact have knowledge of the contents and nature and character of the materials he is charged with transporting or distributing. It is submitted that the failure of the State to prove this essential element of its case against the Petitioners entitle them to a new trial as a matter of law. This is especially true as to Petitioners BATTISTA and GIRDLEY against whom no evidence of *scienter* was produced at trial.

Accordingly, the *scienter* requirements as set forth in the First Amendment Rulings of this Court have been improporly applied as to Petitioners, and each of them, and as such this Petition should be granted.

III

THE PROCEDURES EMPLOYED BY LAW ENFORCEMENT OFFICIALS WERE VIOLATIVE OF PETITIONERS' FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS WHERE AS HERE, THE ISSUANCE OF THE SEARCH WARRANT BY THE MAGISTRATE DID NOT FOCUS SEARCHINGLY ON THE QUESTION OF OBSCENITY, AND WHERE AS HERE, A MASS WARRANTLESS SEIZURE OF APPROXIMATELY THREE HUNDRED (300) ADDITIONALLY SEXUALLY FILMS WAS MADE, IN VIOLATION OF THE TEACHINGS OF *WALTER v. U.S.*, _____ U.S. _____ 100 S. Ct. 2395 (1980), AND WHERE AS HERE, THE "FRUIT" OF THE "POISON" TREE WAS INTRODUCED IN EVIDENCE ON THE ISSUE OF SCIENTER.

The facts involved in the obtaining of the search warrant used to obtain two (2) allegedly obscene films from the warehouse located at 1415 Southwest 21st Street, Fort Lauderdale, Florida were highly unusual and violative of the Petitioners' rights under the First, Fourth and Fourteenth Amendments to the Constitition of the United States. This magistrate authorized search initiated by local law enforcement officials was merely the seminal act that led to the confiscation of three hundred (300) sexually oriented motion picture films by the officers, and this was done without benefit of judicial scrutiny being involved in the seizure process, and was a total prior restraint because all films kept on the premises for rental to local movie house exhibitors were summarily confiscated.

The facts alleged to be highly unusual and violative of Petitioners' rights in summary were as follows:

On July 25, 1977, an investigator for the office of the State's Attorney for Broward County, Florida, appeared befor a Judge Reasbeck, who was a judge within the circuit and obtained a search warrant to seize two (2) films entitled "Emergency Nurse" and "Venture in Bizzare" and in his general language affidavit he alleged that the laws of the State of Florida were being violated. F.S.A. 847.07(4)(c). He states that the following things can be found on the premises "colored motion picture films entitled "Emergency Nurse" and "Venture in Bizzare"and goes on to state that all books and records which are evidence of violation of Florida Statute 847.07(4)(c).

The following observations were contained in the probable cause affidavit. One was that Detective Rigio of the Pompano Beach Department observed an individual leaving the premises at Southwest 21st Avenue in Fort Lauderdale where he drove to a cinema in Pompano Beach, where he moved several cardboard cartons of the size and nature containing motion pictures. He entered the Fashion Cinema. Sergeant Greico observed the individual in conversation with the operator and projectionist at Fashion Cinema. Thereafter, another detective, Marty Schutt observed this individual removing

several other cartons from Fashion Cinema, placing them in the trunk of his vehicle. Then Detective Schutt observed the individual take several cartons from Fashion Cinema and return to the premises where the search later was conducted and removed approximately ten cartons and carried them inside.

On July 7 Detective Rigio looked at the films at the Fashion Cinema and prepared a detailed affidavit describing explicitly the contents. Apparently he then went to a Judge Moore and had a search warrant executed to search the premises occupied by Fashion Cinema in Pompano Beach. The affidavit of Detective Rigo was not shown to Judge Reasbeck at the time Mr. Holloway the investigator from the State's Attorney's Office sought the search warrant for the location at 1415 Southwest 21st Avenue, Fort Lauderdale, Fla. Counsel for the State so stipulated at the time of the hearing on the Motion to Suppress.

In his affidavit, Investigator Holloway, somewhat overstated matters to Judge Reasbeck, when he alleged that Judge Moore had made a finding that the two (2) movies in question were obscene. He did not state that only "probable cause" had been found by Judge Moore as to the premises at Fashion Cinema in Pompano Beach.

Additionally, approximately three hundred (300) hour long films were concededly seized without any warrant. Although these films were not shown to the jury, surely as the "fruits of the poison tree" they should not have even been mentioned in the evidence to the jury. Notwithstanding the objections by Petitioners, the characterization of the films as "sexually oriented" was permitted to go to the jury on the issue of *scienter*.

It is against this factual background that we argue that fundamental rights of Petitioners were violated both by the search authorized by a warrant and the warrantless search.

This warrantless seizure by police officials while executing a search warrant already contended herein by Petitioners to be procedurely suspect, went too far and violated Fourth Amendment proscriptions most recently re-reiterated by this Court in *Walter v. United*

States _____ U.S. _____, 100 S. Ct. 2395, where Mr. Justice Stevens writing on this matter states:

> "When an official search is properly authorized — whether by consent or by the issuance of a valid warrant — the scope of the search is limited by the terms of its authorization . . . That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained."

Certainly as to the warrantless seizure of the three hundred (300) films, and the use of this "fruit" of the "poison" tree at the trial to estalbish attempt to establish scienter on the part of the Petitioners, the State has gone too far and this issue is clearly worthy of certiorari consideration.

The law enforcement officials could have clearly had a remedy available to them as suggested in the case of *U.S. v. Sherwin*, 572 F2d. 196 (CA-9) at page 200 where we read: "A preferable and less intrusive method would be for the officers to seal the area to prevent destruction of any publications while they obtained another warrant." See also *G.I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (CA2 1973). This certainly is now the teaching of this court following the *Walter* case decided on June 20, 1980.

The factual circumstances invlved in obtaining the search warrant from Judge Reasbeck, are so highly unusual that ample precedent to support the same cannot be found in the jurisprudence. To omit showing the judge authorizing the seizure complained of herein, a detailed description of the two (2) films sought to be seized, and to mislead the Judge to believe that another Judge of the same circuit had made a judicial determination of obscenity when in fact it was but merely a finding of probable cause, should be sufficient in the case at bar to invalidate the whole search and seizure.

These issues were presented pre-trial to the Court and she denied the Motions to Suppress directed to the two (2) issues raised herein.

Although not clearly on point, a recent decision by Judge Spellman in an obscenity prosecution in the Southern District of Florida, raised a factual issue not unlike the case at bar. In the case of *United States v. Defalco, et. al.* 509 F. Supp. 127 (D.C. S.D. Fla. 1981) the Court on ruling on pre-trial Motions to Suppress, dealt with a question wherein the affidavit used to obtain the search warrants at several places throughout the United States, contained the conclusory assertions that a grand jury had viewed the suspect materials in question and had determined them to be obscene. No qualifying language about "probable cause" was used therein. There the government concedes that under the facts before Judge Spellman "there was no searching focus on or careful scrutiny of the allegedly obscene mateiral by the magistrate." Against that background, the Court ruled to suppress the materials seized under the search warrants.

Perhaps a more generalized discussion of the law of search and seizure as it relates to cases arising within the penumbra of the First Amendment is in order.

The threshold question is "does the general affidavit and application for search warrant, together with the probable cause affidavit, executed by Affiant, ROBERT HOLLOWAY, an investigator for the State's Attorney's Office for the Seventeenth Judicial Circuit in Broward Count, Florida, togehter with the exhibits attached thereto establish sufficient basis from which the Court could find probable cause to believe that crime was being perpetrated on the premises," to wit: wholesale promotion of obscene matter, Florida Statutes §847.07(4)(c).

It is the assertion of Petitioners that probable cause was not estalbished by the supporting affidavits and the exhibits attached thereto.

The Fourth Amendment of the Constitution of the United States sets for the following:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched and the person or thing to be seized."

In moving to suppress evidence which it is contended has been seized in violation of this constitutional provisions, the Court need apply to the government a burden of only a preponderance of the evidence. The Constitution does not require the government to assume the burden of "reasonable doubt." In *Lego v. Twomey*, 404 U.S. 477 (1972) at pages 488-489, Mr. Justice White writing for the plurality states: " . . . from our experience over this period of time (since *Weeks v. United States*, 232 U.S. 383 (1914)) no substantial evidence has accumulated that Federal rights have suffered from determining admissibility by a preponderance of the evidence."

Further, Justice White rules:

" . . . when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.

In considering whether "probable cause" existed at time of the application for the search warrant, the Supreme Court has these enlightened words of advice for Courts that are considering questions arising under the Fourth Amendment.

"While a warrant may issue only upon a finding of 'probable cause', this Court has long held that the 'term (probable cause) . . . means less than evidence which wold justify condemnation.' *Locke v. United States*, 7 Cranch 339, 348 and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. *Daper v. United States*, 358 U.S. 307." *United States v. Ventresca*, 380 U.S. 102 at 111. See also *Brinegar v. United States, 338 U.S. 160;* Nathanson v. United States, 290 U.S. 41; and, *Draper v. United States*, 358 U.S. 307.

In *Giordenello v. United States*, 357 U.S. 480, the Court was

presented with the question as to whether the complaint on which the warrant was issued was inadequate because the complaining officer, relied exclusively upon hearsay information rather than personal knowledge in executing the complaint. The Court, by Mr. Justice Harlan held that indeed the basis on which the warrant was issued was inadequate and rules:

> "The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed."

In 1964, the high Court attempted to clarify what was required when dealing with an affidavit presenting the litany of what is a "rasonable informant" by its ruling in *Aquilar v. Texas,* 378 U.S. 108, wherein Mr. Justice Goldbers wrote as follows:

> "An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' *United States v. Lefkowitz,* 285 U.S. 452 . . . The affidavit here not only 'contains no affirmative allegation that affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possesison. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied upon . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion', 'belief', or 'mere' conclusion.'

"We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for finding of probable cause and that the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial.'

In *Marcus v. Search Warrant*, 367 U.S. 717 it was stated:

"The use by government of the power of search and seizure as an adjunct to a system for the supression of objectionable publications is not new. Historically, the struggle for freedom of press in England was bound up with the issue of the scope of the search and seizure power . . . the question here is whether the use by Missouri in this case of search and seizure power to suppress obscenity . . . involved abuses inimical to protected expression . . . for the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their exeuciton were adequate to avoid suppression of constitutionally protected material . . . we believe that Missouri's procedures as applied in this case lacked the safeguards which due process determines to assure non-obscene material the constitutional protection to which it is entitled . . . they (police officers) were provided with no guide to the exercise of informed discretion because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity."

Likewise, this Court went even further in *Lee Art Theatre v. Virginia*, 392 U.S. 636, p. 637, when the per curiam opinion stated:

"A seizure of allegedly obscene books on the authority of a warrant 'issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered . . . obscene' was held to be an unconstitutional seizure in *Marcus v. Search Warrant* . . . The procedure under which the warrant

> issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officers' conclusions were not a procedure 'designed to focus searchingly on the question of obscenity . . .' . . . and therefore fell short of constitutional requirements demand necessary sensitivity to freedom of expression. See *Freedman v. Maryland,* 380 U.S. 51.

It is well established that Fourth Amendment guarantees the right to people to be sucure in their persons, houses, and effects, and also apply to businesses. Thus, the holding in *Panzavecchia v. State,* 201 So.2d 762 (1967), regarding the sufficiency of an affidavit for a dwelling house would also seem to apply to the business of Appellants. In that case, it was held that the admission of evidence obtained as a result of a search warrant for a dwelling house was in error where the affidavit on which the warrant was issued did not on its face show probable cause. The Court rejected the State's contention in this case that the State should be permitted to support the affidavit with additional evidence outside of the affidavit and exhibits. The Court discussed the Florida Statutes relating to search warrants (933.06 and 933.18), and stated that where the legislative enacts two laws, one specific, and one general, the specific will control over the general. This would support the idea that the general construction of the warrant as to our Appellants' "books and records" would fail to be specific enough.

In an obscenity case, *State v. U & L Theaters, Inc.,* 307 So2d Fla. App. (1974), the lower Court quashed the search warrant and directed the return of the film. The State took an interlocutory appeal and the Florida District Court of Appeals, Third District, upheld the lower Court; affirmed. The Affiant in this case had viewed the two films that had been seized, he described the contents of these films in detail, whereupon the judge issued a search warrant stating that he found probable cause. The only copies of the films were seized and the obscenity *vel non* of the materials seized was not determined prior to seizure. The question was whether the seizure of the films, being

the only copies, was unreasonable under the *Fourth Amendment* standards. Citing *Heller v. New York*, 413 U.S. 483 (1973), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), the Court held that seizing the only copies represents the same restraint on expression as the seizure of all the books in a bookstore. Thus, prior to the issuance of the warrant for the seizure of the Appellant's only copies of the materials, it was necessary that a neutral and detached magistrate have a full opportunity for an independent judicail determination of probable cause and further was thus able to "focus searchingly on the question of obscenity." The Third District Court stated that with respect to the case at bar, the trial judge issued the search warrant which resulted in seizure based upon his perfunctory examination of an affidavit, submitted by the law enforcement officer, with no offer by the State to permit copying thereof pending a determination of their obscenity *vel non*. The Court thus found that the procedure designed to focus searchingly on the issue of the obscenity *vel non* of the materials. The Court found the warrant insufficient and the seizure unreasonable under the Fourth Amendment standards as a form of constitutionally prohibited prior restraint.

The preceding cases support the proposition that the affidavit was insufficient in that it only states the names of two movies without any detailed description of the contents thereof, stating merely that Detective Rigia "prepared a detailed affidavit describing explicitly the contents of said (two) films."

That affidavit was not attached to the search warrant application in the case at bar, and thus we are left with the thought that absent the detailed description of each film by affiant, that there was no informed, focused, guided and objective inquiry into the question of obscenity *vel non* of the films. We have only the conclusory assertions of obscenity by the law enforcement officers, a procedure condemned in the case of *Lee Art Theatre v. Virginia, supra.*

Assuming for the sake of argument that the affidavits together

with the exhibits as presented to the Judge in this matter did establish "probable cause" to search for the two films, we still contend that the seizure of the "various documents, lists, labels, business records and books" listed in the inventory were improperly seized and thus the fruits of an illegal search and seizure and must be suppressed.

The search warrant in the case at bar provided in pertinent part for the seizure of "all books and records which are evidence of the violation of Florida Statute 847.07(4)(c)." The authroization to seize said books and records did not particularize what books and records were to be seized pursuant to the warrant, and thus left ot the investigators executing the search warrant, the discretion to decide for themselves what books and records were evidence of the violation of the applicable Florida law.

The Fourth Amendment provides in pertinent part as follows:

> "particularly describing the place to be searched, and the persons or things to be seized."

In *Stanford v. Texas*, 379 U.S. 476, the United States Supreme Court reversed a finding of the lower Court which allowed a Texas Judge to issue a search warrant authorizing the seizure of all items" . . . unlawfully possessed in violation of Article 6889-3 and to take possession of same." The high Court stated:

> "In short, what this history indispensible teaches is that the constitutional requirement that warrants n ast particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude . . . the constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case."

This search, conducted without probable cause, and in violation of Petitioners' Fourth Amendment rights to freedom from such unreasonable intrusions falls squarely within those cases that require exclusion of the evidence. Failure to supress such evidence is grounds for reversal of the trial Court verdict. *Mapp, supra; Stone,* 428 U.S. 465 90 Sup. Ct. 3037 (1976); *Linkletter v. Walker,* 381 U.S. 618 85 Sup. Ct. 1731 (1965); *Terry v. Ohio,* 382 U.S. 1, 88 Sup. Ct. 1868 (1968); and, *U.S. v. Calandra,* 414 U.S. 338 94 Sup. Ct. 613 (1974).

CONCLUSION

For the foregoing reasons, a Writ of Certiotari should issue to review the judgment and order of the Fourth District Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1981

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

78-2027, 78-2028, 78-2029, 78-2030, 78-2031, 78-2032.

MICHAEL LOCHIATTO, CHERYL ROGERS a/k/a CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME and ANTHONY BATTISTA,
Appellants,
vs.
STATE OF FLORIDA
Appellants,

Decision filed February 11, 1981

Consolidated appeals from the Circuit Court for Broward County; Miette K. Burnstein, Judge.

Bruce L. Randall, Fort Lauderdale, and Robert Eugene Smith, Encino, California, for Appellants.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, West Palm Beach, for Appellee.

PER CURIAM.

AFFIRMED.

LETTS, C.J., ANSTEAD and BERANEK, JJ., concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

78-2027, 78-2028, 78-2029, 78-2030, 78-2031, 78-2032.

MICHAEL LOCHIATTO, CHERYL ROGERS a/k/a CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME and ANTHONY BATTISTA,
Appellants,
vs.
STATE OF FLORIDA
Appellants,

March 12, 1981

BY ORDER OF THE COURT:

ORDERED that the Motion for Rehearing filed February 25, 1981 by Appellants is denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH, CLERK

cc: Bruce L. Randall, Esq.
Robert Eugene Smith, Esq.
Joy B. Shearer, Assistant Attorney General

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APPENDIX C

CONSTITUTIONAL and STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . obridging the freedom of speech, or the press. . . ."

2. The pertinent provisions of the Fourth Amendment are:

   "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

3. The pertinent provisios of the Fifth Amendment are:

   "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

4. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the laws.

STATE STATUTES

5. The pertinent provisions of the F.S.A. 847.07(1) reads as follows:

"A person commits the offense of distributing obscene materials when knowing the obscene nature thereof, he sells, rents, leases, exhibits, or otherwise disseminates to any person any obscene material of any description or who offers to do so, or who possesses such material with the intent to do so." Misdemeanor in the First Degree.

6. The pertinent provisions of F.S.A. 847.07(4)(c) reads as follows:

*". . . that any person who knowingly wholesale promotes any obscene matter or in any manner knowingly hires, employs, uses or permits any person to wholesale promote or assist in wholesale promoting any obscene matter is guilty of a felony of the third degree which is punishable by up to five years in the State Prison.**

*Wholesale promote means to provide, deliver, transfer, distribute, circulate, disseminate, or offer or agree to do the same, with or without consideration, for purposes of redistribution."